

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)	
)	
Plaintiff-Appellee,)	
)	
v.)	S.CT. NO. 16-0824
)	
JOHN WALTER MULDER,)	
)	
Defendant-Appellant.)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR SIOUX COUNTY
HONORABLE STEVEN J. ANDREASEN, JUDGE

DEFENDANT-APPELLANT'S APPLICATION FOR FURTHER REVIEW
OF THE DECISION OF THE IOWA COURT OF APPEALS
FILED AUGUST 2, 2017

Jared R. Weber, #23890
ICIS #: AT0009177
PO Box 412
Orange City, IA 51041
(712) 737-3887
(712) 737-3886-fax
jared@weberlawiowa.com
ATTORNEY FOR DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

On the 22nd day of August, 2017, the undersigned certifies that a true copy of the foregoing instrument was served upon the Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to John Walter Mulder #0404259, Fort Dodge Correctional Facility, 1550 L Street, Fort Dodge, Iowa 50501 and the Plaintiff by EDMS.

WEBER LAW OFFICE,



Jared R. Weber

QUESTIONS PRESENTED FOR REVIEW

**WHETHER THE COURT OF APPEALS ERRED IN FINDING
STATE V. ROBY CONCLUSIVELY DETERMINED DEFENDANT'S
MINIMUM SENTENCE WAS AUTHORIZED BY STATUTE**

TABLE OF CONTENTS

	<u>Page</u>
Certificate of Service.....	ii
Question Presented for Review.....	iii
Table of Authorities	v
Statement Supporting Further Review	1
Statement of the Case.....	2
Argument	
Division I.....	3
Conclusion.....	9
Attorney's Cost Certificate	10
Certificate of Compliance	11

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page:</u>
<i>State v. Lyle</i> , 854 N.W.2d 378, 404 (Iowa 2014).....	2
<i>State v. Seats</i> , 865 N.W.2d 545, 553 (Iowa 2015).....	3
<i>State v. Roby</i> , 2017 WL 2610616, at *5-6 (Iowa 2017).	4, 7
<i>State v. Sweet</i> , ____ N.W.2d ____, 26-29 (Iowa 2016).....	5
<i>State v. Howard</i> , No. 14-1549 (Iowa Ct. App. July 27, 2016).....	6
<i>State v. Louisell</i> , 865 N.W.2d 590, 592 (Iowa 2015).....	6
<i>State v. Null</i> , 836 N.W.2d 41, 75 (Iowa 2013).....	7
 <u>Statutes and Court Rules:</u>	
Iowa R. App. P. 6.1103(b)(1), (2), (4).....	1
Iowa Code §902.1(2) (2015)	4

STATEMENT SUPPORTING FURTHER REVIEW

Defendant-Appellant, John Walter Mulder, pursuant to Iowa R. App. P. 6.1103, makes Application for Further Review from the August 2, 2017 decision of the Iowa Court of Appeals in *State of Iowa v. John Walter Mulder*, Supreme Court No. 16-0824.

This court should grant further review in this matter for the following reason(s):

- (1) The court of appeals has entered a decision in conflict with a decision of this court or the court of appeals on an important matter.
- (2) The court of appeals has decided a substantial question of constitutional law or an important question of law that has not been, but should be, settled by the Supreme Court.
- (3) The case presents an issue of broad public importance that the Supreme Court should ultimately determine.

See, Iowa R. App. P. 6.1103(b)(1), (2), (4).

STATEMENT OF THE CASE

Nature of the Case:

This is an appeal by the Defendant-Appellant, John Walter Mulder, from a juvenile resentencing based upon a murder conviction in 1976 when Defendant was 14 years old. The Honorable Steven Andreasen presided in Sioux County District Court.

Course of Proceedings in the District Court:

The Defendant-Appellant was charged with Murder in the First Degree in violation of Iowa Code Section 707.2 on September 24, 1978, from events occurring on or about April 23, 1976. A jury trial was held on January 16, 1979 and the Defendant was found guilty of Murder in the First Degree and sentenced to life without parole on February 2, 1979, spending the last 37 years in prison.

In *State v. Lyle*, the Iowa Supreme Court invalidated mandatory sentencing that prevents sentencing courts from considering mitigating factors relevant for juvenile offenders. *State v. Lyle*, 854 N.W.2d 378, 404 (Iowa 2014). The Supreme Court ordered district courts to recall and conduct resentencing hearings of all presently incarcerated offenders who were convicted of crimes that occurred before they were 18 years old. *Id.*

Defendant's Resentencing Hearing took place on May 11, 2016, at which time the Defendant was sentenced to life in prison with eligibility for parole after 42 years. The Defendant filed a Notice of Appeal on May 13, 2016.

This Court transferred the matter to the Iowa Court of Appeals by Order filed July 11, 2017, for non-oral submission. The Iowa Court of Appeals affirmed the District Court's resentencing decision on August 2, 2017.

ARGUMENT

THE COURT OF APPEALS ERRED IN FINDING *STATE V. ROBY* CONCLUSIVELY DETERMINED DEFENDANT'S MINIMUM SENTENCE WAS AUTHORIZED BY STATUTE

Preservation of Error and Standard of Review:

Juvenile Defendants receiving a resentencing under *Lyle* are based upon constitutional claims and a constitutional right against cruel and unusual punishment, therefore the standard of review is de novo. *State v. Seats*, 865 N.W.2d 545, 553 (Iowa 2015). Defendant-Appellant filed a timely notice of appeal from the resentencing.

While the Court of Appeals noted an abuse of discretion standard applies to the sentencing procedure, this only applies to the sentencing procedure and sentence imposed, not whether Defendant's Constitutional rights were violated in imposing a sentence not authorized or which is

constitutionally cruel and unusual. *State v. Roby*, 2017 WL 2610616, at *5-6 (Iowa 2017).

Merits:

Defendant-Appellant respects the recent decision in *State v. Roby*, 2017 WL 2610616 (Iowa 2017), however believes the principles set forth therein do not fully apply to the statutory framework for Defendant. *See*, Iowa Code §902.1(2). While the Court's decision in *Roby* provides a minimum sentence does not violate Article I Section 17 of the Iowa Constitution, the decision only applied to a statute with a specific or prescribed amount of time. In *Roby*, the statute in question availed a defendant to a specified amount of time of incarceration, namely 70 percent of 25 years for a Class B felony sex abuse in the second degree, which is 17.5 years. *Roby*, at *2. The same is not true under §902.1(2)(a)(2), which arguably avails a defendant to an unlimited amount of years of incarceration. Simply stated, §902.1(2)(a)(2) would allow the sentencing court to sentence a defendant to an amount of years exceeding the nature life of a defendant. Nothing in §902.1(2)(a)(2) limits a sentencing court from sentencing a defendant to 60 years before eligibility for parole or even 100 years.

The arguments set forth by the defendant in *Roby*, as specifically shown

in the Petition for Further Review are equally insightful and applicable to this Petition for Further Review. In light of the well-reasoned and researched arguments in Division I of defendant Roby's Petition for Further Review, Defendant-Appellant asks the Court to consider those arguments here, as though they were all set out herein. The history and use of the *Lyle/Miller* factors as applied to the myriad of defendants in cases before the Iowa Supreme Court has evolved. Further, it is unresolved whether the *Roby* decision applies to minimum sentences by a statute that itself sets no bar or limit on the minimum sentencing. *Roby* left unresolved the constitutionality of a statute (§902.1(2)(a)(2)) that leaves open to unfettered ability to sentence a defendant to minimum sentence that extends beyond the scope of a natural defendant's life.

More specifically, Defendant notes that *Roby* highlighted the inconsistency and concerns with the application of the *Lyle/Miller* factors. *State v. Sweet*, ____ N.W.2d ____, 26-29 (Iowa 2016). The arguments set forth by *Roby* are particularly concerning when noting that under §902.1(2)(a)(2), the District Court has the ability to sentence a defendant to a term of years that could effectively be as much as life without parole. This is such because under §902.1(2)(a)(2) the Court could sentence someone to

60 or 100 years. The inconsistency and concerns with the *Lyle/Miller* factors are especially concerning for Defendant-Appellant being sentenced to 42 years before eligibility for parole.

The Petition for Further review filed in *Roby* expressly sets forth the inconsistent application of the factors when sentencing juvenile offenders. The range of sentences issued based on the *Lyle/Miller* factors, arguably now the “*Roby*” factors, has caused a wide range of sentences in the various notable cases heard by this Court. But again, the Court has reviewed the Petition for Further Review in *Roby* and considered how to apply the *Lyle/Miller* factors and ruled in *Roby* minimum sentencing is constitutional.

Defendant-Appellant’s Petition more specifically identifies the unresolved issue of the constitutionality of §902.1(2)(a)(2) and whether it provides unconstitutional discretion to the sentencing court. This unconstitutionality is the fact that the now reworked *Roby* factors would allow the sentencing court to apply them in a manner under §902.1(2)(a)(2) to sentence a defendant to a cruel and unusual term, whether that is 60 years, 100 years, or in this case 42 years.

This issue, as stated in the original appellate brief, is amplified by the posture of the resentencing hearing. For instance, the defendants in *State v.*

Howard, No. 14-1549 (Iowa Ct. App. July 27, 2016) and *State v. Louisell*, 865 N.W.2d 590, 592 (Iowa 2015) benefited by the timing and posture of their cases, which were not subjected to the statutory schema of §902.1(2)(a)(2). Defendant here was subjected by a statute that availed him to a term of years using the original *Lyle/Miller* factors. Thus, the sentencing judge weighed the *Lyle/Miller* factors to determine at what amount of time, 15 years, 42 years, 60 years, or 100 years a juvenile has attained rehabilitation? As this Court has noted, “even expert psychologists have difficulty making this type of prediction.” *State v. Null*, 836 N.W.2d 41, 75 (Iowa 2013). Yet, after *Roby*, this Court has further expounded upon the *Lyle/Miller* factors to now cast doubt on how they were applied, especially when lengthy minimum sentences such as Defendant-Appellant’s are issued. *Roby*, at *30. In the Court’s *Roby* decision (Section II-D-6) the Court highlights that the “factors must not normally be used to impose a minimum sentence of incarceration without parole unless expert evidence supports the use of the factors to reach such a result.” *Id.*

There was no such expert record or testimony before the District Court for Defendant to support why 42 years of minimum incarceration without parole supported the five factors in *Roby*. Because §902.1(2)(a)(2) provides

discretion to sentence a juvenile to a term of years that could extend beyond life, it is akin or equivalent to a life sentence. In light of the procedural timing of this case and in context of the unlimited amount of time a minimum sentence could be imposed for, Defendant-Appellant's sentence was unconstitutionally cruel and unusual.

While *Roby* implies, and the State will surely argue, the sentence Defendant received was a Constitution mandatory minimum sentence. The statute authorizing this sentence did not prescribe a particular minimum sentence nor did the sentencing court use the *Roby* factors for guidance in determining why Defendant-Appellant received such a harsh sentence.

When reviewing the cases presented to the Iowa Supreme Court for review, Defendant has, thus far, received the longest sentenced under §902.1(2)(a)(2) of any juvenile defendant. Nothing in the record supports why Defendant-Appellant, under the *Roby* analysis is that rare case where rehabilitation was not attainable for 42 years. When looking at the Court's *Roby* decision, it is clear the application of the newly framed *Lyle* factors presents the real problem §902.1(2)(a)(2) creates. Defendant-Appellant's 42 year minimum sentence was based upon the Court's use of inconsistently applied *Lyle* factors, rather than the how those factors were applied in *Roby*.

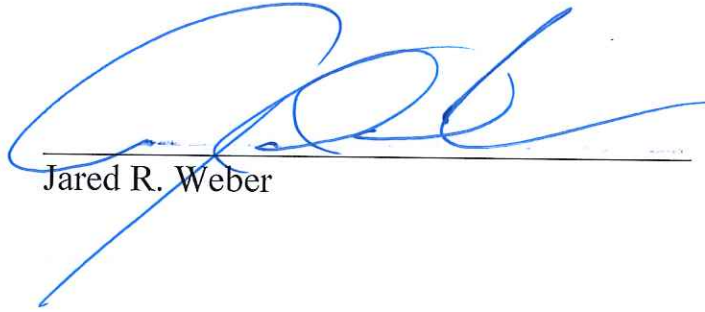
Combining the misuse of *Lyle/Miller* with the unconstitutionally broad scope of §902.1(2)(a)(2) created a 42 year sentence before parole eligibility for Defendant-Appellant that was cruel and unusual.

CONCLUSION

For the reasons stated above, the Defendant-Appellant respectfully requests this court to grant further review and to vacate his sentence and remand the matter for resentencing.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was \$0.00 and that amount has been paid in full by the undersigned attorney.



Jared R. Weber

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE
REQUIREMENTS**

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

[X] this brief contains 1,611 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or (2)

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

[x] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, font 14 point.



Jared R. Weber, #23890

ICIS #: AT0009177

PO Box 412

Orange City, IA 51041

(712) 737-3887

(712) 737-3886-fax

jared@weberlawiowa.com

ATTORNEY FOR DEFENDANT-APPELLANT

Dated: 8-22-17

IN THE COURT OF APPEALS OF IOWA

No. 16-0824
Filed August 2, 2017

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN WALTER MULDER,
Defendant-Appellant.

Appeal from the Iowa District Court for Sioux County, Steven J. Andreasen, Judge.

John Mulder appeals the order resentencing him for a crime he committed as a juvenile. **AFFIRMED.**

Jared R. Weber, Orange City, for appellant.

Thomas J. Miller, Attorney General, and Tyler J. Buller, Assistant Attorney General, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Bower, JJ.

DOYLE, Judge.

John Mulder was fourteen years old when he shot and killed Jean Homan while she was asleep in her bedroom. A jury convicted him of first-degree murder, and he was sentenced to life in prison without the possibility of parole. Three decades later, Governor Brandstad commuted the sentences of juvenile offenders to life in prison with parole eligibility after sixty years. Mulder moved for resentencing, and after holding an individualized sentencing hearing, the district court imposed a sentence of life in prison with parole eligibility in forty-two years.

On appeal, Mulder contends the requirement that he serve forty-two years of his sentence before parole eligibility violates the Iowa Constitution because it “is the equivalent of a life sentence with no parole [and] no meaningful or realistic opportunity for release.” He makes the blanket argument that any minimum period of incarceration violates the Iowa Constitution’s prohibition against cruel and unusual punishment. Our supreme court recently rejected this claim in *State v. Roby*, ___ N.W.2d ___, ___, 2017 WL 2610616, at *10 (Iowa 2017), holding the Iowa Constitution does not prohibit imposing mandatory minimum terms of incarceration on juveniles. We likewise reject Mulder’s claim.

Mulder also contends the district court’s sentence is illegal because the court failed to consider and weigh the mitigating factors set forth in *State v. Lyle*, 854 N.W.2d 378, 404 n.10 (Iowa 2014).¹ These factors include:

¹ Mulder also argues the court considered evidence that was improperly introduced at the resentencing hearing. He concedes his trial counsel made no objection to the introduction of the evidence he complains of and argues his counsel rendered ineffective assistance in that regard. We reject his claims outright. Although he claims that one of the victim impact statements improperly included several quotes from a confidential psychology report, he cites no authority supporting his argument that this information was improper.

(1) the age of the offender and the features of youthful behavior, such as "immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) the particular "family and home environment" that surround the youth; (3) the circumstances of the particular crime and all circumstances relating to youth that may have played a role in the commission of the crime; (4) the challenges for youthful offenders in navigating through the criminal process; and (5) the possibility of rehabilitation and the capacity for change.

Lyle, 854 N.W.2d at 404 n.10 (citations omitted).

In resentencing Mulder, the district court noted it was required to give specific consideration to several factors because of Mulder's status as a juvenile offender:

The first factor is the prior pronouncement that sentencing a juvenile to life in prison without the possibility of parole should be rare and uncommon.

Second, the court must recognize that "children are constitutionally different from adults." This is a consideration of a juvenile's lack of maturity, underdeveloped sense of responsibility, vulnerability to peer pressure, and the less fixed nature of a juvenile's character and how that impacts the ability to be rehabilitated.

The court must also take into account any information in the record regarding the defendant's family and home environment such as any information concerning abuse, parental neglect, personal or family drug or alcohol abuse, prior exposure to violence, lack of parental supervision, lack of an adequate education, and a juvenile susceptibility to psychological or emotional damage.

The court must also and does consider the circumstances of the offense itself, the extent of the defendant's participation and the

Mulder also complains the court permitted multiple victim impact statements from individuals who were not immediate family members of Jean Homan. He claims only immediate family members may provide victim impact statements, citing the portion of Iowa Code section 915.10(3) that defines a victim as also including "the immediate family members of a victim who died or was rendered incompetent as a result of the offense or who was under eighteen years of age at the time of the offense." However, the first part of this section defines a victim as "a person who has suffered physical, emotional, or financial harm as the result of a public offense or a delinquent act, other than a simple misdemeanor, committed in this state." See Iowa Code § 915.10(3). Because nothing in chapter 915 limits victim impact statements to immediate family members, we reject his argument.

conduct, and the way any familial or peer pressures may have affected him.

As noted before, the court must also consider that juveniles are more capable of change than are adults. Their actions are less likely to be evidence of irretrievably depraved character.

The court stated it had “considered all of those factors in determining a sentence in this matter.”

Before pronouncing sentence, the district court noted it gave particular consideration to several factors in the record “that would weigh in favor of [Mulder] having the immediate eligibility for parole.” Specifically, the court cited Mulder’s behavior during his thirty-seven years of incarceration, noting the absence of violent incidents, “relatively little or no violations or reports of misconduct” during the past fifteen years, and a favorable employment record that included being placed in “trust type of positions within the department of corrections” and “speak[ing] to youth about the consequences of criminal behavior.” The court considered Mulder’s family and home environment, noting that it “played a role in his development as a youth.” It further noted the lack of rehabilitative services Mulder received prior to committing the murder, classifying his prior delinquent acts as “going towards his youth and those factors of his youth.” Finally, the court determined that “some of those psychological red flags that existed when he was younger and at the time of this crime appear to have diminished.” The court then turned its attention to the factors it considered that weighed against immediate parole eligibility, which included: (1) the nature, facts, and circumstances of the crime; (2) the impact the crime had on Homan’s family; and (3) Mulder’s attempt to escape from prison by digging a tunnel, which was not a crime of opportunity but was “planned out over a course of time” and

occurred when Mulder was thirty-seven years old. The record shows the court appropriately considered the *Lyle* factors.

The court resentenced Mulder to life in prison with parole eligibility in forty-two years. Although Mulder complains that the record “does not support a determination that [he] is incapable of rehabilitation for a minimum of 42 years,” we are unable to conclude on the record before us that the district court abused its discretion in imposing this sentence. See *Roby*, ___ N.W.2d at ___, 2017 WL 2610616, at *5-6 (noting we review a sentence for an abuse of discretion where the district court “follows the sentencing procedure we have identified and a statute authorizes the sentence ultimately imposed” while clarifying that this standard “is not forgiving of a deficiency in the constitutional right to a reasoned sentencing decision based on a proper hearing”). Accordingly, we affirm.

AFFIRMED.



IOWA APPellate COURTS

State of Iowa Courts

Case Number
16-0824

Case Title
State v. Mulder

Electronically signed on 2017-08-02 08:49:42